Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES L. LARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Larson's conviction deny him due process of law because his conduct was not within the range for criminal liability under 18 U.S.C. §1001?

2. Did the exclusion of the best extrinsic evidence of bias of a major prosecution witness violate Larson's rights guaranteed by the Fifth and Sixth Amendments to the Constitution?

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I. PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals filed May 19, 1997, Case No. 96-30226, reprinted as Appendix A hereto, in order to review the standards for determining whether particular conduct falls within the range for criminal liability under 18 U.S.C. § 1001 and to review the scope of admissibility of extrinsic evidence of bias of major prosecution witnesses.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is being timely filed in accordance with Rule 13.1 of this court.

III. APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant portions of constitutional provisions and statutes pertaining to this petition are as follows:

Fifth Amendment to U.S. Constitution

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . ..

Sixth Amendment to U.S. Constitution

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, ...

18 U.S.C. § 371

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

IV. STATEMENT OF THE CASE

A. Statement of Facts

The indictment in this case, in Count I, charged a conspiracy of James Richard Hand, James L. Larson and Marilyn Larson to commit offenses against the United States, including transporting, selling, etc. illegally obtained halibut[1] and **to make and use a false writing or document in violation**

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[1]In violation of 16 U.S.C. § 773(e)(a)(5) and regulations thereunder and 16 U.S.C. §§3372(a)(1) and 3372(d)(3)(A)(ii).

of 18 U.S.C. § 1001 (ER 1-7).[2] Count II charged the making and using of a false writing or document, to-wit: a fish ticket made out for Marilyn Larson, in violation of 18 U.S.C. § 1001. Id.

At the time of trial, Larson was 42 years of age, a high school graduate with two years of college, married to Marilyn since 1985, with one step-daughter and three grandchildren (Hand ER 362-63). Due to a serious stroke suffered by Larson's father and two heart attacks suffered by his mother, the Larsons rented a house in

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[2]This is a reference to the Excerpt of the Record submitted to the court of appeals by Larson. References to the Excerpt submitted by Hand are "Hand ER" and by the government are "SER."

Seattle adjacent to his parents' home and Marilyn spends most of the time there, but James still fishes out of Juneau, Alaska. Id.

Larson has been a full time commercial fisherman since 1979 (Hand ER 364). Prior to that, he was a special assistant to the Chairman of the Commercial Fisheries Entry Commission for five years, and before that he was a boat carpenter. Id. He also has a contract with the State Department of Environmental Conservation (DEC) to do oil spill clean-up work (Hand ER 365).

Both James and Marilyn Larson were licensed for various fisheries activities during 1991-93, the period involved in this case (Hand ER 84-86). Larson had vessel licenses for the "Last Unicorn" and the "Rocking Moon" (Hand ER 367-68), issued by the International Halibut Commission (Hand

ER 360), and he held a seafood processing facility permit issued by the DEC. Id.

In 1991, after other fishing activities, Larson fished the halibut opening in May with the "Last Unicorn" with his brother and another person as crew (Hand ER 370-71). He sold his catch to Alaska Seafood Company, of which Dick Hand is the principal owner and manager (Hand ER 371).

Larson also fished the halibut opening and sold his catch to Hand's company in May 1992. He got involved in filleting fish because he fishes in an area infested with sand fleas, avoided by other fishermen (Hand ER 374-75). By filleting and trimming the fish to get rid of the bad parts, he could end up with a good product (Hand ER 376).

Larson enjoys an excellent reputation as a responsible, honest, hardworking, moral and law-abiding citizen among people who

know him in the community (ER 25-40).

Hand and his wife are 65 percent owners of Alaska Seafood Company, which they founded in 1965 (Hand ER 219). He is president and his wife is office manager (Hand ER 217). The company has a small plant, occupying about 3,500 square feet, plus office space (Hand ER 220), and the company employs from 5 to 27 people, depending on the season (Hand ER 223). It does canning, filleting, packaging and smoking of various types of fish, including shrimp, halibut, salmon and crabs (Hand ER 223-24).

Larson and Hand became acquainted because they were both commercial fishermen and their boats were kept at the same docks, and they became good friends (Hand ER 221, 35). Hand has, at times, entrusted Larson with a key to his plant, and because Larson

is licensed to do processing on his vessel, Hand has contracted with Larson to bring in fish which have been fully or semi-processed, because it saves man hours and space in Hand's plant and is a mutually beneficial arrangement, providing a good quality product (Hand ER 231-35).

When fish are delivered by a fisherman to a processing plant, it is the processor's duty to make out a fish ticket. Each year, the Department of Fish and Game issues a metal tag with identification to each processor and a card to each fisherman to permit him to fish. The permit is embossed with the fisherman's name, social security number and vessel license number. When fish tickets are prepared, the processor's metal tag is imprinted on them along with the information from the fisherman's permit (Hand ER 226-27). A fish ticket is in

quadruplicate, with a white original and three colored copies. One copy goes to Fish and Game, one to the fisherman, and the processor files the original with all other tickets for the particular fishery and files the remaining copy in a file he maintains for each fisherman who sells to him (Hand ER 227-29).

Hand's practice is to have a worksheet made out at the dock when fish are delivered and to use the worksheet information in preparing fish tickets (Hand ER 292-93). Sometimes Hand makes mistakes and has to void a fish ticket and issue a correct one. When a fish ticket is prepared, a check is attached to be given to the fisherman along with his copy of the ticket (Hand ER 293-94).

Hand refers to the worksheets as "weightsheets" or "scalesheets" or

"tallysheets" (Hand ER 252-54). It is traditional in the halibut fishery to deduct 10 percent of the weight for heads and guts and to deduct about 2 percent for ice and slime (Hand ER 255-56). Fish tickets have no space for calculating weights of fillets, so an extrapolation is made on the basis that the fillets are about 60 percent of the weight of round fish and the fish ticket reflects what the fish would have weighed if they had not been filleted (Hand ER 256-57).

Larson's fish tickets reflect deliveries from the "Last Unicorn" of 7,475 pounds of headed and gutted halibut from the May 1991 opening (Hand ER 266-67) and 9,721 pounds from the spring 1992 opening (Hand ER 274). In 1992, Hand had a market for fresh halibut fillets, so he contracted with Larson to fillet his catch (Hand ER 271).

Larson filleted most of those fish on his boat in its stall in Harris Harbor, and his wife and brother transported them to Alaska Seafood to be weighed and stored in the cooler (Hand ER 387-88). Hand was fishing himself, so he left instructions with his daughter for the unloading, weighing and storing of the fillets in the cooler (Hand ER 271-72). The next morning, Hand discovered that the cooler had not been turned on (Hand ER 272-73). Hand and Larson determined the fillets were not in a marketable condition, so they put them in a freezer van (Hand ER 271, 277). They decided to take the fish out in small quantities, thaw them and reprocess them over a period of months, in slack times (Hand ER 278). From March to June, 1993, Larson removed the fish a couple of boxes at a time, took them to his boat, allowed them

to thaw, removed the skin and trimmed the fillets, and Hand kept a ledger of the weights of these reconstituted fillets (Hand ER 391-92).

In June 1993, Larson fished the halibut opening, as usual in the "Last Unicorn" towing the "Rocking Moon" loaded with gear and halibut totes behind, and his crew was Randy Rice (Hand ER 393-95). Larson filleted some of the fish and put them in totes on the "Rocking Moon" (Hand ER 295-96). Upon returning to the harbor, they unloaded the fish from the "Last Unicorn" and the filleted fish and weighed them; then Larson went to Harris Harbor, tied up and worked into the night filleting the fish that were left on the "Rocking Moon" and then delivered the fillets to Alaska Seafood Company, weighed them and recorded the weights on a small sheet of paper and put it

in the top right-hand drawer of Hand's desk, as they had agreed (Hand ER 398-400). It being late, no one was at the plant, except one other fisherman. Id.

Hand fished that halibut opening in a different location from Larson, and he chartered a plane to pick him up from the boat so he could travel by commercial airline to Northern California to attend his daughter's wedding (Hand ER 205, 283, 286). He was absent from Alaska from June 11 to June 14, 1993 (Hand ER 285).

Hand is the only person at Alaska Seafood authorized to imprint fish tickets and he intended to do that immediately after returning from his daughter's wedding (Hand ER 225, 287). He left instructions for the worksheets from the halibut deliveries to be put in his desk drawer (Hand ER 283-85).

Hand had been informed by a staff

member before he went to his office the morning of June 15, 1993 that State Trooper Steven Arlow had visited during his absence, gone through his desk and taken the original worksheets reflecting halibut deliveries (Hand ER 288). There was a stack of copies of the worksheets, but the tallysheet for Larson's fillets was not included and it has never been found (Hand ER 288-89).[3] The work sheet for Larson's first delivery was there, so Hand made out a ticket for 2,916 pounds of headed and gutted halibut (Hand ER 295), but Hand knew the fillets had been delivered and he had no record of the

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[3]A motion to dismiss for failure to preserve exculpatory evidence was filed because Arlow visited the plant on a Sunday afternoon when only a new employee was there and he seized numerous documents, allowing the employee to copy the worksheets, but he left no inventory of what he took, but the motion was denied (CR 69, 74).

weights (Hand ER 296). He also knew that he was required to make fish tickets for all deliveries in a timely manner. Id. Unable to think of anything better, as an approximation, Hand used the weights of the reconstituted fillets Larson had done during the spring, which had been on the 1992 fish ticket, and he made out the fish ticket for the "Rocking Moon" in Marilyn Larson's name, and he made checks to go with the two fish tickets (Hand ER 296-97).[4]

When Marilyn Larson visited the plant later that day, because her husband was out crabbing, the fish tickets and checks were there waiting (Hand ER 297). She brought

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[4]The fish ticket in the name of Marilyn Larson is the "false writing or document" referred to in both counts of the indictment.

with her a note[5] from her husband. Upon comparing the fish tickets with the note, Marilyn said the tickets did not appear to be correct and that they should be reviewed by her husband (Hand ER 8, 299). Hand gave her the checks, but retained the fish tickets, which he set aside on his desk, so he could resolve the matter with Larson and make a correct fish ticket and void the incorrect ones (Hand ER 8, 300-01). The other fish tickets in the stack were taken over to the bookkeeper for entry into the computer and the copies were distributed in the usual way (Hand ER 300). The Larson tickets were the only ones remaining on Hand's desk with all copies intact (Hand ER 301). But Hand never had an opportunity to void the incorrect Larson fish tickets and

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[5]The contents of the note will be quoted infra.

issue a correct one, because Trooper Arlow appeared with a search warrant and seized the Larson fish tickets along with all of Hand's records (Hand ER 302)

One of the principal Prosecution witnesses was Joey Isturis, who had worked as plant foreman for Alaska Seafood until late 1992 (Hand ER 129-30). Upon being investigated for illegal taking and selling of fish, which he processed after hours in Hand's plant in Hand's absence, Isturis eventually admitted limited illegal activity and the agents gave him a choice of being a witness against Hand and the company or being a defendant (Hand ER 141, 145, 147). After that, Isturis told the agents that Larson had taken and processed Halibut out of season (Hand ER 145-47, 160). In the trial Isturis testified that he believed he was potentially a defendant, but the agents

had told him that it would "depend on your level of cooperation" (Hand ER 159).

B. Proceedings

The indictment was returned on June 20, 1995 charging as previously described (ER 1-7). All three defendants pleaded not guilty (CR 29).

At trial, the jury returned verdicts of guilty on all charges as to all three defendants (Hand ER 455-56). All three defendants filed motions for acquittal (CR 103-5). Marilyn Larson's motion was granted, but Larson's and Hand's motions were denied (Hand ER 71-74).

Larson was sentenced to five months of imprisonment and five months of home confinement and then two years of supervised release (ER 41-44). See Appendix B. Larson has served his imprisonment.

The convictions have been affirmed by

the court of appeals. See Appendix A.

V. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

A. Section 1001 of 18 U.S.C. Does Not Give Fair Warning That Conduct Such As Larson's May Incur Criminal Liability

Both Counts of the indictment required proof beyond a reasonable doubt of five essential elements of 18 U.S.C. § 1001: a statement, falsity, materiality, specific intent, and federal agency jurisdiction. United States v. Boone, 951 F.2d 1526, 1544 (9th Cir. 1991).

In United States v. Lanier, ___ U.S. ___, 117 S.Ct. 1219, 1224-25 (1997), this court, in explaining the principle that due process requires that no man should be held criminally responsible for conduct which he could not reasonably understand to be proscribed, referred to what Justice Holmes spoke of as "fair warning ... in language

that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." (Internal citation omitted). This court explained:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." ... Second, as a sort of "junior version of the vagueness doctrine," ... the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. ... Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, ... due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior decision has fairly disclosed to

be within its scope, ...

Larson's conduct pertaining the fish ticket in Marilyn Larson's name, the alleged false writing or document, was to send his wife to Hand with a note which stated:

> Dick: Please give Marilyn a fish ticket to reflect my total halibut delivery poundage. This should include forty-four hundred pounds of fillets and twenty-nine eighty-seven pounds of heads off fish. Please convert this all to heads-off fish on the fish ticket. I also have credit coming for 24 pounds prawns, 75 pounds cod fillets. My debits include two one-thousand dollar advances and miscellaneous bait. Thanks, Jim.

(Emphasis added.) (SER 10). When Marilyn arrived with the note, Hand already had, not "a" fish ticket, but two fish tickets made out and checks to go with them: one in Larson's name for the "Last Unicorn" for 2,916 pounds (Hand ER 295), and one in Marilyn's name for the "Rocking Moon" for

6,053 pounds (SER 12). Not only did neither of the fish tickets reflect Larson's "total" catch, as he requested in the note, both of them together did not add up to his "total" catch, which, after converting the fillets to the equivalent of heads off fish, amounted 10,320 pounds,[6] compared to 8,969 pounds, the total of the two fish tickets prepared by Hand. Marilyn signed her husband's name to the one and her own to the other, but then told Hand they did not appear to be correct. In granting her motion for acquittal, the district court recognized this and stated that Hand "promised to double check it. Before a new

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[6]Larson's total catch was usually in this range. As previously shown, his 1992 fish ticket for the "Last Unicorn" was for 9,721 pounds.

fish ticket could be prepared, the ticket was seized pursuant to a search warrant" (Hand ER 74). Thus, the court recognized that the fish ticket on which the charges were based was a draft which was set aside to be corrected after Hand could confer with Larson, but that did not occur and Larson never saw it, because it was seized. Larson argued for acquittal because he did not make the fish ticket and it was never "used." The fish ticket not only was never submitted to a department or agency of the United States; it was not submitted to anyone; it was not even filed.

Section 1001 does not warn that criminal liability may attach for holding an incorrect writing or document until it can be corrected. To convict on the basis of the fish ticket in this case is equivalent to convicting a person of a violation on the

basis on an unspoken thought, about which § 1001 also does not warn. Many years ago James Orwell warned about the "thought police" in 1984, but most people seem to think that threat has never materialized. But for Larson, it did.

Other than from Orwell, there has never been a warning that criminal liability may attach for conduct such as Larson's. Section 1001 gives no such warning to a man of "common intelligence." Nor can any prior judicial decision be found providing such a warning. The courts previously have required that liability is incurred on the basis of a false writing only after it has been submitted to someone, or at least placed in a file. United States v. Frazier, 53 F.3d 1105, 1115 (10th Cir. 1995) (conviction based on documents being placed by the defendant in a file in the office in

which he worked, knowing that the Department of Labor had jurisdiction over the files, which were subject to audit); United States v. Ross, 77 F.3d 1525, 1544-45 (7th Cir. 1996)(use of a document to deceive a private company which had a part in decisions by a government agency about the disbursement of federal funds); United States v. Oren, 893 F.2d 1057, 1064 (9th Cir. 1990)(false letter given to appraiser of land which the National Park Service was authorized to purchase).

The court of appeals cites United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983), in which the city government discovered the fraud before the false information reached the federal government. But the distinction between that case and this case is that the false document was submitted to someone. The multiple copies

of the fish ticket were entered intact into evidence at trial. The officer who seized the fish ticket had the opportunity to contradict Hand's testimony that he had segregated this fish ticket from the others, the multiple copies of which were separated and put into the process of distribution, but this one was kept on his desk. There was no evidence to the contrary, and the district court so held when it acquitted Marilyn Larson, so there was no question for the jury to consider.

Thus, neither the statute nor any prior decision gives warning that conduct such as Larson's is proscribed. They do not warn that an erroneous document set aside for correction is a "statement" within § 1001. They do not warn that such a document would have a natural tendency to influence a decision-making body to which it is

addressed (materiality). United States v. Gaudin, ___ U.S. ___, 115 S.Ct. 2310, 2313, 123 L.Ed.2d 444 (1995). They do not warn that making a mistake and wanting to correct it is the specific intent required by § 1001. (Larson did not even see the erroneous fish ticket and it did not reflect what he requested in his note.) And they do not warn that erroneous drafts or thoughts are within the jurisdiction of a government agency or department.

B. The Best Evidence of Bias of a Major Prosecution Witness Was Excluded

The right of an accused to present witnesses in his defense is guaranteed by the due process clause of the Fifth Amendment to the Constitution, Washington v. Texas, 388 U.S. 14, 19, 93 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967), and the compulsory process clause of the Sixth Amendment.

Taylor v. Illinois, 484 U.S. 400, 408, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). Reversal is mandated unless error in denying these rights is harmless beyond a reasonable doubt. Delaware v. Van Arsdale, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1984).

During the trial, the defense presented Lili M. Knightlinger as a witness (Hand ER 340 et seq.). She testified that she had moved in and lived with Joey Isturis for a period of about three months in the late summer and early fall of 1991, and again for a longer period of time in 1992. Before there was any objection to her testimony, she had said she had met Isturis through drugs and she left him due to domestic violence.

Upon objection, the defendants urged that Knightlinger's testimony would be

offered to show bias, interest and motive on the part of Isturis. The defense was allowed to make an offer of proof out of the presence of the jury. Knightlinger testified about Isturis getting calls at all times of the day and night about picking up and making deliveries of illegally taken fish. Between September and November, 1991, Isturis received at least twenty such calls and she went with him about six times and on some occasions she saw him pick up fish from boats and take them after hours to Alaska Seafood and process them when Hand was not there. She went crabbing with Isturis and he would keep all the crabs that came up even if they were under legal size, and he would process them and sell them. She also had bank records of Isturis which would show he had a lot more money than he earned legally. But this evidence was excluded by

the court and the jury did not hear it.

Isturis was the only witness to testify as to some of the accusations in the conspiracy charge, such as alleged illegal fishing in 1991 (Hand ER 139-42). At sentencing the court commented, "I do not find that Isturis' testimony otherwise lacks credibility. Indeed, I believe him and his testimony apart from those estimates to be reasonable" (Hand ER 467). If the court believed Isturis' testimony, it may be inferred that the jury probably did also. This indicates that the defense had a need for stronger impeachment evidence than was heard by the jury. Knightlinger could have provided evidence of much more extensive illegal conduct than Isturis admitted, thereby giving him strong motivation to be helpful to the prosecution, since he had been told that what would happen to him

would depend on his "level of cooperation."

The court of appeals recognized that the defense was entitled to introduce extrinsic evidence of bias, but since the fact that Isturis was testifying to gain favor of the government had already been brought out, Knightlinger's testimony was unnecessary. See, Appendix at A9.

But the evidence Knightlinger could have presented was much stronger than any evidence which was admitted, showing much stronger motivation on the part of Isturis to say whatever would help the case against Hand and Larson, than could be shown by any other evidence. The right to compulsory process is illusory if the process is used to get the witness who can present the best evidence into court and then the witness is not allowed to testify.

VI. CONCLUSION

The court is urged to grant the writ and, upon hearing the case, to reverse the convictions.

Respectfully submitted the 11 day of August, 1997.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES RICHARD HAND, Defendant-Appellant	No. 96-30224 D.C. No. CR A95-057-JKS
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES L. LARSON, Defendant-Appellant.	No. 96-30226 D.C. No. CR A95-057-JKS MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge,
Presiding

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted
April 11, 1997--Seattle, Washington

Filed May, 19, 1997

Before: WRIGHT, REINHARDT and THOMAS, Circuit Judges

James Hand and James Larson were convicted of conspiracy to knowingly transport, sell, receive, acquire and purchase halibut in violation of federal fisheries laws, and for making a false statement to a federal agency in violation of 18 U.S.C. §1001. Hand and Larson appeal their convictions and sentences, and we affirm. Because the parties are familiar with the facts and procedural history, we will not repeat it here.

A.

Hand and Larson allege that the evidence was insufficient to support their convictions for making false statements to

a federal agency under 18 U.S.C. § 1001. We disagree.

Under 18 U.S.C. § 1001, it is unlawful for any person "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," to "knowingly and willfully. . . make[] or use[] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. . . ." Conviction under Section 1001 requires proof beyond a reasonable doubt of five elements: a statement, falsity, materiality, specific intent, and federal agency jurisdiction. United States v. Boone, 951 F.2d 1526, 1544 (9th Cir.1991). We affirm the conviction because, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. See United States v. Jones, 84 F.3d 1206, 1210 (9th Cir.), cert. denied, __ U.S.__, 117 S. Ct. 05, 136 L. Ed. 2d 319 (1996).

The government presented evidence that Hand completed a fish ticket for the June 1993 halibut opening at Larson's request which falsely classified fish caught by Larson as fish caught by his wife. Thus, the "statement" and "falsity" elements are satisfied. A statement is material under Section 1001 if it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." United States v. Gaudin, __ U.S. __, 115 S. Ct. 2310, 1313, 132 L. Ed. 2d 444 (1995) (internal quotations omitted). The government presented evidence that a

fish ticked is a document upon which the National Marine Fisheries Service, an agency of the United States, relies in its management of the halibut fishery. Thus, a rational trier of fact could find that the fish ticket at issue was capable of influencing a government agency even though the ticket was never actually submitted. See United States v. Heuer, 4 F.3d 723, 734 (9th Cir. 1993), cert. denied, 510 U. S. 116, 114 S. Ct. 1190, 127 L. Ed. 2d 540 (1994); United States v. Oren, 893 F.2d 1057, 1064 (9th Cir. 1990).

The government offered specific intent evidence from which a rational trier could have found that Larson and Hand agreed to create a false fish ticket classifying fish caught by Larson as fish caught by his wife. Hand and Larson concede that Larson's wife did not fish the June 1993 opening. A

rational trier of fact could have found that Larson sent a note to Hand requesting that a fish ticket be made out in the name of Larson's wife. Hand made out such a ticket and delivered a check to Larson's wife. The weights on the fish ticket matched weights from a ledger that Trooper Arlow identified a tally sheet of weights and dates of illegal halibut delivered by Larson to Alaska Seafood Company prior to the June 1993 opening. Larson and Hand had a full opportunity to present their version of the facts to the jury. The jury chose to disbelieve their testimony. Because we find sufficient evidence upon which to base the jury's decision, we will not disturb it on appeal.

Finally, the false fish ticket was within the jurisdiction of a federal agency. Larson and Hand argue that because the fish

ticket was set aside for correction and was not intended to be submitted, it was not within the jurisdiction of any government agency. In addition to the fact that a reasonable juror may not have believed that the ticket was set aside for correction, a false statement need not be made directly to a government agency, but need only relate to a matter in which a federal agency has the power to act. Heuer, 4 F.3d at 734 (concluding that a bill of lading intended for internal corporate use was within the jurisdiction of a government agency); see also United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983) (upholding conviction under 18 U.S.C. § 1001 where city government's early discovery of fraud kept false information from actually reaching the federal government). The National Marine Fisheries Service is charged with analyzing

the information in such tickets in its management of the halibut fishery. Thus, the National Marine Fisheries Service had the power to act with regard to the false fish ticket and the jurisdiction element is satisfied.

Accordingly, we affirm the 18 U.S.C. § 1001 convictions.

B.

Hand and Larson argue that the district court violated their Fifth and Sixth Amendment rights by excluding a portion of defense witness Knightlinger's testimony. They contend that this testimony showed government (sic) Isturis's motivation to lie. Hand and Larson claim that Knightlinger's testimony would have shown that Isturis was motivated to make false accusations against Hand and Larson. Whether an evidentiary ruling denies a

defendant's Fifth or Sixth Amendments (sic) rights is a question of law that we review de novo. United States v. Contreras, 63 F.3d 852, 857 (9th Cir. 1995).

We find that Hand and Larson's constitutional rights were not violated. It is well established that parties are entitled to introduce extrinsic evidence that a witness is biased. United States v. Abel, 469 U. S. 45,50-56, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). However, this right is not unlimited and only permits the defendant to present sufficient evidence with which to assess the witness's possible bias and motivation for testifying. United States v. Jackson, 882 F.ed 144, 1447 (9th Cir. 1989). Knightlinger's testimony may have shown that Isturis was testifying in order to gain favor with the government, which was threatening to prosecute him for

his own illegal fishing activities. The fact that Isturis may have been testifying to gain favor of the government was already clearly brought out during the defendants' cross-examination of Isturis. Accordingly, Hand and Larson's constitutional rights were not violated when the district court refused to admit Knightlinger's testimony.

C.

Larson argues that a supplemental jury instruction allowed the jury to convict Hand and Larson without finding an essential element of the offense of conspiracy. We review de novo whether a jury instruction misstates the elements of a statutory crime. United States v. Tagalicud, 84 F.3d 1180, 1183 (9th Cir. 1996). Because Larson makes his argument for the first time on appeal, we review for plain error and may reverse his conviction only if the district court

committed a clear error that affected his substantial rights. United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 1776-78, 123 L. Ed. 2d 508 (1993). We hold that the district court did not commit plain error.

The district court gave the following jury instruction:

> Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing an a particular overt act that you find was committed.

In response to a question from the jury, the district court gave the following supplemental instruction:

> [T]he government does not have to prove beyond a reasonable doubt that a conspiracy existed during the entire period alleged in the indictment. But the government must prove beyond a reasonable doubt the existence of a conspiracy sometime during the period alleged within the indictment.

Larson argues that the two instructions, read together, allow the jury to improperly convict the defendants based upon an overt act that occurred within the period alleged in the indictment but not within the period the conspiracy existed. We reject this argument. The initial instructions were clear that the individual committing the overt act must be a member of the conspiracy, and that the overt act must be "for the purpose of carrying out the conspiracy." A jury could not logically find that a "member of the conspiracy" committed an overt act "for the purpose of carrying out the conspiracy", but at a time when no conspiracy existed. The district court did not commit plain error.

D.

Hand and Larson contend that the district court erred in calculating a sentence

enhancement under U.S.S.G §2Q2.1(b)(3)(A). We review a district court's factual findings for clear error and its application of the facts to the Sentencing Guidelines for abuse of discretion. United States v. Robinson, 94 F.3d 1325, 1327 (9th Cir. 1996).

Section 2Q2.1 (b)(3)(A) states, "If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 . . . ." Application Note 4 to Section 2Q@.1 states:

> When information is reasonably available, "market value" under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation . . . cost.

The district court adopted a fair market value figure for the halibut of $5.99 per pound, the price charged by two local grocery stores. Hand and Larson argue that the fair market retail price should not apply to them because they participated in the wholesale market which charges $2.50 per pound. The district court's decision is in accordance with the plain language of the Sentencing Guidelines which require use of the "fair-market retail price." Further, we note that this is a question in which the district court is in a far better position to assess than we are. We find no clear factual error and no abuse of discretion in the district court's application of the facts to the Sentencing Guidelines.

AFFIRMED.

B1

UNITED STATES DISTRICT COURT

District of Alaska

UNITED STATES OF AMERICA

v.

JAMES L. LARSON

JUDGMENT IN A CRIMINAL CASE[1]
(For Offenses Committed On or After November 1, 1987)

Case Number:
3:95CR00057-002

PETER M. PAGE
Defendant's Attorney

THE DEFENDANT:[2] was found guilty on counts 1 and 2 as stated in the Indictment after a plea of not guilty.

Title & Section	Nature of Offense
18 U.S.C. ' 371	Conspiracy
18 U.S.C. ' 1001 & 2	False Statements

Date Offense Concluded	Count Number(s)
07/03/1993	1
06/15/1993	2

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[1]Filed JUL 17 1996

[2]Portions of the printed form not used in this judgment are omitted here.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 534-56-4366

Defendant's Date of Birth: 03/14/1953

Defendant's USM No.: 12951-006

Defendant's Residence Address:

609 Main Street, Juneau, AK 99801

Defendant's Mailing Address:

609 Main Street, Juneau, AK 99801

07/15/1996
Date of Imposition of Judgment

/s/ James M. Fitzgerald
Signature of Judicial Officer

JAMES M. FITZGERALD
U.S.DISTRICT JUDGE
Name & Title of
Judicial Officer

July 16, 1996
Date

DEFENDANT: JAMES L. LARSON
CASE NUMBER: 3:95CR0057-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 5 months.

The defendant shall surrender for service of sentence at the institution designated by
the Bureau of Prisons: as notified by the Probation or Pretrial Services Office.

DEFENDANT: **JAMES L. LARSON**
CASE NUMBER: 3:95CR00057-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below). See Special Conditions of Supervision - Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the firs five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training,

or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence of employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the

defendant's criminal record or personal

history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Judgment-Sheet 3.01

DEFENDANT: JAMES L. LARSON
CASE NUMBER: 3:95CR00057-002

SPECIAL CONDITIONS OF SUPERVISION

Within seven days of release from imprisonment, the defendant shall be placed on home confinement with electronic monitoring and be eligible for the curfew program from 7 a.m. through 7 p.m. The defendant shall comply with the conditions of home confinement for a period not to exceed 150 days. During this period, the defendant shall remain at his place of residence except for employment and other activities approved by the probation officer, and shall maintain a telephone at his place of residence without special

features such as call forwarding, a computer modem, caller ID, call waiting, or portable cordless telephones for the stated period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer.

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STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): as ruled upon at sentencing.

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: 1

Imprisonment Range: 10 to 16 months

Supervised Release Range: 2 to 3 years

Fine Range: $3,000.00 to $30,000.00

Fine waived or below the guideline range because of inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.